

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

DUKE UNIVERSITY

-and-

**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU)**

Case No. 10-RC-187957

**DUKE UNIVERSITY'S REQUEST FOR EXPEDITED REVIEW,
STAY OF ELECTION/IMPOUNDMENT OF BALLOTS OR,
IN THE ALTERNATIVE, REMAND TO THE REGIONAL DIRECTOR**

PRELIMINARY STATEMENT

On November 10, 2016, Service Employees International Union (“SEIU” or the “Union”) filed its petition seeking certification as representative of a bargaining unit consisting of:

“All PhD and Masters students in Duke University departments housed at Duke’s campuses in Durham and Beaufort, North Carolina, who are working toward degrees offered by the Duke Graduate School and who are employed by Duke University to provide instructional services in undergraduate courses or graduate-level courses or labs (including, but not limited to, Teaching Assistants, Graduate Assistants, Laboratory Assistants, Teaching Apprentices, Instructors, Graders, Preceptors, Section Leaders, and Tutors) or to provide research services (including, but not limited to, Research Assistants and Graduate Assistants).”¹

A hearing on SEIU’s petition was held from November 28 through December 7, 2016, in Durham, NC. The principal issue litigated in that proceeding was the employee status of the petitioned-for PhD students, based on Duke University’s Offer of Proof demonstrating material factual differences between its teaching and research assistants and the graduate students found to be Section 2(3) employees in *Columbia University*, 364 NLRB No. 90 (2016).

On January 18, 2017, the Regional Director issued his Decision and Direction of Election (“DDE”) in which he concluded, contrary to the weight of the evidence, that Duke PhD students providing instructional and/or research services meet the common law test of employee status articulated in the Board’s recent *Columbia University* decision.

Duke takes strong exception to the Regional Director’s finding that the petitioned-for students are statutory employees and will seek review of that clearly erroneous finding at the

¹ On November 28, SEIU amended its petition to limit the bargaining unit to PhD students who perform instructional and research services. The Union withdrew its claim for representation of Master’s students providing such services.

appropriate time.² At issue here and now are two determinations that directly affect the imminent election and require immediate attention from the Board, *i.e.*, the voter eligibility formula and the Regional Director's decision to conduct the election by mail ballot, both of which *must* be reviewed and decided *before*, not after, the election. Compounding the Regional Director's errors, both issues were prejudicially affected by the Regional Director's improper reliance on secret *ex parte* student affidavits, as discussed in more detail below.

As to eligibility, without conducting the necessary evidentiary hearing, the Regional Director devised a special eligibility formula that finds no support in the record. There is no supporting evidence for the simple reason that, ignoring Duke's repeated requests for a hearing, the Regional Director refused to allow a proper record to be made. At his direction, the Hearing Officer ruled that the eligibility formula was a non-litigable issue, and that no testimony would be permitted. That ruling was flatly inconsistent with General Counsel Griffin's *Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015* (Memorandum GC 15-06) -- totally ignored by the Regional Director in the DDE -- which expressly provides that the eligibility formula "must be litigated at a pre-election hearing if in dispute." *Id.* at 13. It also is in violation of the Board's direction in *Columbia University*. *Columbia University*, 364 NLRB No. 90, slip op. at 22 (remanding for a hearing on eligibility). Here, the formula was very much in dispute, calling for a pre-election evidentiary hearing.

The Board's review of this situation is made especially urgent and compelling by the Regional Director's reliance on secret *ex parte* student affidavits -- excluded from the record at his direction -- poisoning the decisional process. At the same time that the Regional Director

² This application is made without prejudice to the University's right, post-election, to request review of the Regional Director's finding and conclusion that the students in question are "employees" within the meaning of Section 2(3) of the Act.

refused to allow Duke to call witnesses on this plainly litigable issue, he made it known through the Hearing Officer that, over Duke's strenuous objection, he intended to rely on several previously undisclosed *ex parte* affidavits that had been submitted to the Regional Office by SEIU prior to hearing. (Tr. 1159-63, 1166, 1174, 1222) Remarkably, the Hearing Officer refused to provide these secret affidavits to the University, ruling that Duke was not entitled to the statements inasmuch as they addressed only so-called "non-litigable" issues. In point of fact, the affidavits were not so limited in scope. The DDE is silent as to this travesty as well, clearly signaling that in addition to denying a hearing, the Regional Director compounded his error by relying on the secret affidavits to support his eligibility formula and, quite likely, to direct that the election be conducted by mail ballot. A clearer deprivation of due process would be hard to imagine. It is typical of the unfairness that permeated the hearing.³

As to the manner of voting, the Regional Director determined that the election should be conducted by United States mail rather than in person and on campus, *i.e.*, manually -- the preferred method -- despite his frank acknowledgement that the record contains "*little factual information upon which to determine which election method would be most effective.*" DDE at 31; emphasis added. Here again, the absence of evidence is the result of the Regional Director's own refusal to permit an evidentiary hearing on the issue and his apparent reliance on the secret affidavits.

As matters now stand, ballots are scheduled to be mailed to all eligible voters on February 3, and will be opened and counted at the NLRB's Winston-Salem Sub-Regional Office on February 21. In the absence of a stay of the election/impoundment of the ballots and a

³ The bias against Duke inherent in this proceeding is already well-known to the Board, having reversed two prejudicial Regional Director rulings against Duke. *Duke University*, 10-RC-187957 (Nov. 17, 2016) (Order granting appeal to postpone hearing)); *Duke University*, 10-RC-187957 (Dec. 9, 2016) (Order granting appeal of briefing schedule).

remand to the Regional Director for further hearings, both of which are sought here, the University will be forced to challenge the ballots of every voter made eligible by the special formula devised by the Regional Director. By Duke's estimate, this would mean challenges to over 400 ballots.

ISSUES FOR BOARD REVIEW AND RELIEF SOUGHT

Based on the imminent mailing of the ballots, the University requests expedited review of the Regional Director's findings and conclusions with respect to both voter eligibility and mechanics of the election, specifically the use of merit ballots.

Review in this case is sought on the grounds that (i) the DDE is clearly erroneous on substantial factual issues, prejudicially affecting the University's rights; and (ii) that the rulings made during the proceeding, denying the University an opportunity to litigate the voter eligibility formula and the method of conducting the election -- combined with the Regional Director's prejudicial reliance on the secret affidavits -- resulted in prejudicial error.

Pending decision on review, the Board should either stay the election or, in the alternative, cancel the February 21 ballot count and impound the ballots. Section 102.67(j) of the Board's Rules provides for such extraordinary relief "upon a clear showing that it is necessary under the particular circumstances of the case." Such a showing is made here. Only by staying the election and/or impounding the ballots can the Board assure the parties, the students and the public-at-large that the critical issues raised on review are decided strictly on the merits and without regard to how the ballots have been cast in the election. The integrity of the certification process is at stake. Although the rules by which the Board now operates may have changed, the importance of preserving confidence in the Agency's impartiality is no less today than in the past.

ARGUMENT

I. The Regional Director Erred in Devising a Special Eligibility Formula Without Conducting a Hearing on That Issue

The Regional Director has correctly stated Duke's position that "no special eligibility formula is needed and that the traditional eligibility requirement (those employees on the payroll immediately preceding the date of the election) should apply." DDE at 33. It is also a correct statement of Duke's stance on this issue that "past service in one of the included unit positions [is] not indicative of an expectation of future employment." *Id.*

In virtually all other respects, the University takes exception to the Regional Director's treatment of the voting eligibility issue. DDE at 33-35. His analysis, such as it is, is exceedingly thin, but that is not surprising given the Hearing Officer's refusal (at the Regional Director's own direction) to take testimony and otherwise develop a full record on the issue.

His reliance on *Columbia University* is entirely misplaced. Unlike here, in that case, upon the Board's order, the Regional Director conducted an evidentiary hearing on the voter eligibility formula. There, the parties were afforded an opportunity to litigate the issue. Only after a hearing and briefing -- where UAW and Columbia were allowed to adduce evidence (facts and statistics) regarding the likelihood that students not serving as a graduate assistant on the date of the election, would serve at some point in the future -- did the Regional Director decide upon a one-year look back period. Here, however, the DDE is devoid of any particularized showing that even arguably could support a conclusion that the special eligibility formula crafted by the Regional Director -- which would include not only PhD students providing instructional and research services this semester, but also those who served as teaching or research assistants and received nine-month stipends in either or both of the last two semesters -- enfranchises students who have a "continuing interest in the terms and conditions of

employment of the unit,” *i.e.*, students who are likely to be appointed again. *See Columbia University*, 364 NLRB No. 90, slip op. at 21.

The Regional Director opines that “[t]he fact that a student is not serving as a TA or RA during the semester is not an indication that they will not do so in the future.” DDE at 34. With that it may be difficult to argue, but the real test is whether the service as a TA and RA in the recent past is a predictor of future service so as to render an individual eligible to vote. To determine that requires a detailed analysis that was not undertaken here because, in total disregard for GC Memorandum 15-06, the issue was unilaterally declared to be non-litigable by the Regional Director. Not a word is said about this in the DDE.

As discussed in Duke’s post-hearing brief, the standard voter eligibility formula applied by the NLRB in representation elections includes all employees in the petitioned-for classifications who are on the employer’s payroll and working as of the close of the pay period immediately preceding either the issuance of a decision and direction of election, or the approval of a stipulated election agreement. *See Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1952); *Bill Heath, Inc.*, 89 NLRB 1555 (1950); *Macy’s Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 n.3 (1993).⁴

When the parties disagree on the formula for determining voter eligibility, as in this case, the Board has said that unless “the evidence adduced at the hearing . . . support[s] a deviation from our usual eligibility requirements, eligibility will be determined by the usual payroll period.” *See B-W Construction Co.*, 161 NLRB 1600, 1602 n.4 (1966), citing *R.B. Butler, Inc.*,

⁴ Administrative notice should be taken that the standard formula has been (or will be) followed in other graduate student elections conducted by the NLRB, including NYU, Harvard and Yale.

160 NLRB 1595 (1966). The evidence here does not support a deviation from the norm, not even close.

As noted above, General Counsel Griffin has written that under the amended regulations that went into effect on April 14, 2015, “[i]f a party contends that a different eligibility formula than the Board’s standard formula must be used, this matter must be addressed before the election.” Memorandum GC 15-06 at 17. The eligibility formula was specifically identified by the General Counsel as one of only about a dozen issues that “*must* be litigated at a pre-election hearing if in dispute.” *Id.* at 13; emphasis added. That instruction was blatantly ignored during the hearing and it was ignored again in the DDE.

Here, there is a sharp dispute between the parties over the correct formula to be used to determine voter eligibility. The University maintains that the Board’s standard eligibility formula, as described above, should be used. The Union, on the other hand, advocates for a one-year look-back period, under which any PhD student who either currently performs instructional or research services or who did so during the preceding academic year, would be eligible to vote. (Tr. 1077-78) Because the Union is seeking an other-than-standard formula to determine eligibility, the burden rested squarely on its shoulders to present evidence demonstrating that a one-year look-back is appropriate. *See B-W Construction Co.*, 161 NLRB 1600 (1966). The Union dramatically failed to meet that burden. It is extraordinary that the Regional Director was unable to see that.

Eligibility of PhD students who held appointments as teaching or research assistants during 2016, but who are not serving in that capacity now, turns, as we have said, on whether those students are likely to be appointed again. An evidentiary hearing on the issue would be required to make such a determination. Here, litigation was improperly foreclosed.

In *Columbia University*, the Regional Director determined in a Supplemental Decision and Direction of Election issued on October 31, 2016, that a non-standard voter eligibility formula, with a one-year look-back period, was appropriate. However, she made that determination after a day-long hearing on remand by the Board. 364 NLRB No. 90, slip op. at 22. (*See also* Tr. 1217) In this case, no hearing was allowed on the issue, despite the Board's instruction in *Columbia University* and the clear mandate of GC Memorandum 15-06 that a hearing is required. Duke even went so far as to make an offer of proof, although none should have been necessary on an issue so clearly designated for a pre-election hearing by the Board's own General Counsel. Duke's offer was rejected by the Regional Director, depriving the University of any opportunity to make a record on that important issue. (Tr. 1222; *see also* Tr. 1061, 1159)

More importantly, the facts in *Columbia University*, especially as they relate to eligibility, are markedly different. At Duke, teaching and research expectations vary widely by department and school, based on degree requirements. As a result, there can be no single answer across the Graduate School as to whether any particular Graduate Assistant who held an appointment in the past, is likely to hold one in the future. (Tr. 1067-68, 1213) The Regional Director ignored this as well. Indeed, SEIU failed to produce any evidence to support a finding that such students would have a reasonable expectation of re-appointment, utterly failing to meet its burden of proof. As a result, it has not been shown -- let alone proven -- that graduate students who held a teaching or research assistantship in 2016 but not now, have the necessary "continuing interest" in the terms and conditions of employment to justify their participation in this 2017 election.

For these reasons, the Regional Director should have applied the standard eligibility formula proposed by the University. Having failed to do so, the Board should stay the election and/or impound the ballots, grant review and reverse. Failing that, the case must be remanded to the Hearing Officer to receive testimony and other evidence on this issue so that a determination can be made based on a proper factual record, not speculation and conjecture.⁵

The secret *ex parte* student affidavits that the Union submitted to the Regional Office prior to the hearing, of which the University had no notice until the eve of the hearing's conclusion, do not -- and cannot -- constitute such a proper record. Section 102.68 of the Board's Rules defines the "record" in a representation proceeding. *See* 29 CFR § 102.68. The affidavits, which the Hearing Officer would not admit into evidence, are not part of the "record." *Id.* Once the Regional Director decided to conduct a hearing, soliciting the parties' positions concerning the appropriateness of a mail ballot election and voter eligibility formula, among other matters related to the petition, he may only render a decision based on the official "record," *i.e.*, testimony, other evidence, and argument presented at the hearing. (Tr. 1069-88, 1097-1144, 1180-1192, 1195-1223, 1226-1233, 1239-1249) No "backdoor" litigation should have been allowed, through affidavits from individuals who have not been subject to cross-examination at all, or in the case of two witnesses, about the contents of their secret affidavits. The unfairness

⁵ It is worth noting that the voter eligibility formula crafted by the Regional Director has caused considerable confusion and consternation on campus. Questions abound. For example, many students are hard-pressed to understand why colleagues who are not serving as either teaching or research assistants now but did so during the Spring or Fall 2016 semesters are eligible, while those who have not yet been appointed to an assistantship, but who know to a certainty, based on the academic/funding requirements of their department, that they will do so in the 2017-2018 academic year, are not eligible to vote but will nonetheless be bound by the outcome of the election. It is a fair question for them to ask and one that exemplifies the need for the hearing that was wrongfully denied on this issue. All this may be beside the point to the Regional Director, but the Board should know that it is a major concern of Duke's graduate student body and, of course, University administration.

of such a procedure is too obvious to require further discussion.⁶ The RD's reliance on secret *ex parte* student affidavits is a highly prejudicial denial of Duke's fundamental due process rights that must be corrected by the Board.⁷

II. The Regional Director Erred in Directing That the Election be Conducted by Mail Ballot

The Regional Director further erred in directing a mail ballot election without a supportable explanation for departing from the Agency's clear preference for manual balloting. Indeed, he acknowledged that the record contained "little factual information upon which to determine which election method would be effective." DDE at 31. If anything, his admission should favor an in-person, on-campus election, not a mail ballot.

The University bears no responsibility for any shortcomings in the record. Rather, a fuller record on election mechanics could not be developed because, despite Duke's eagerness to present evidence on this important issue, the Regional Director refused to permit the parties to do so. Indeed, the Hearing Officer ruled that "we are not litigating the election method here,"

⁶ The Hearing Officer attempted to defend the Regional Director's decision to consider the previously undisclosed affidavits because in her view, they pertained to "non-litigable" issues: voter eligibility and voting method. We disagree. The Union's affidavits plainly addressed issues beyond voter eligibility and voting method, proffering facts that purport to show that Duke's PhD students are statutory "employees." Even the portions of the affidavits seemingly intended to address the eligibility and mail ballot issues should not have been considered because those assertions of fact were inextricably intertwined with assertions of fact related to the employee status issue. (Tr. 1164) Moreover, the General Counsel Memorandum cited above, GC 15-06, clearly states not merely that voter eligibility is "litigable," but rather that it "*must* be litigated if in dispute." (Emphasis added)

⁷ To be sure, the affidavits submitted from students whom the Union *also* called as witnesses in the hearing held here should not be given any weight. For example, one of those affidavits, provided by Mr. Longarino, contradicted his testimony at the hearing. Mr. Longarino's affidavit states that PhD students in his department, Religious Studies, must be a Teaching or Research Assistant every semester to receive their full stipend, unless for a particular semester the student receives funding through a fellowship or a teaching position at a different institution. But on cross-examination, he admitted that another student was allowed to conduct research outside of the Durham area in lieu of her teaching obligation without any adverse impact on her stipend. (Tr. 846) Mr. Longarino also contradicted his affidavit by conceding on cross-examination that students in his department are allowed to take a year off from teaching at any point between the students' second through fifth years of study. (Tr. 804)

explaining that the Regional Director feels the record “is sufficiently complete on the matter of the election method.”⁸ (Tr. 1205) It was patently unfair for the Regional Director to deny the University the opportunity to present testimony and other evidence on the issue, and then suggest that it failed to meet its burden of proof -- but that is precisely what he has done.

Moreover, there is no basis for the Regional Director’s finding that Duke “provided little in the way of information as to . . . how many students there were with multiple mailing addresses.” DDE at 31. To the contrary, the University raised this issue at the hearing and it was thoroughly addressed in its post-hearing brief. (Duke Br. at 9-10, 49-52.) The facts are that although the University maintains records of student addresses, the vast majority of the PhD students in the proposed bargaining unit -- about 81% of all eligible voters -- have multiple addresses on file with Duke. Some have as many as five or six addresses listed. (Er. Ex. 39; Tr. 1104-07, 1109) Regina Nowicki de Guerra, Database Analyst at the Graduate School, provided a detailed affidavit documenting that if a mail ballot election were to be directed, Duke would not know which addresses to use to ensure that the ballots are received. (Er. Ex. 39; Tr. 1109-11) The University does not require students to designate a “preferred” address. (Er. Ex. 39; Tr. 1110-11) Thus, if a mail ballot election is ordered, Duke would be left to guess which address to use for about 1200 of the nearly 1500 voters. (*Id.*)

The Regional Director disregarded this evidence. To make matters worse, while ignoring the University’s presentation at the hearing, the Regional Director credited and relied on the secret affidavits submitted by SEIU prior to the hearing. Over Duke’s objection, the Hearing Officer ruled that these affidavits would be considered by the Regional Director to determine the

⁸ The University even presented the Hearing Officer with an offer of proof on the manner of conducting the election. It, too, was denied by the Regional Director due to his belief that the record already was complete on the matter.

appropriate voting method. (Tr. 1159-63, 1166, 1174) Inasmuch as the DDE does not indicate otherwise, we must assume that the Regional Director did in fact rely, at least in part, on the SEIU's secret affidavits in violation of Sections 102.67 and 102.68 of the Board's Rules.⁹ This was prejudicial error, not to mention a deprivation of due process and fundamental fairness.¹⁰

The Regional Director also disregarded Board practice and procedure in concluding, without explanation or analysis, that "holding a mail ballot election would be the best means of conducting the election in the matter." DDE at 31. The NLRB Casehandling Manual recognizes that the "[t]he Board's longstanding policy is that representation elections should, as a general rule, be conducted manually." NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2 (September 2014). And, the cases establish a presumption in favor of manual ballot elections. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 470-71 (1998) ("Under Board precedent and policy, the applicable presumption favors a manual, not a mail-ballot election."). Mail ballots are to be utilized *only* in "unusual circumstances." Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, Section 22-110 (August 2012) (emphasis added). The Regional Director completely ignored these authorities,

⁹ SEIU agreed to provide the five affidavits to Duke. Upon receipt, the University sought to introduce the affidavits simply to preserve its rights on appeal to challenge the highly irregular procedure followed by the Regional Office in this case, while at the same time making it abundantly clear that those self-serving extrajudicial statements should not be accepted for the truth of the matters asserted therein, particularly in light of the fact that two of the affiants had already testified in the proceeding, and that under cross-examination, at least one of them had contradicted certain statements in his affidavit. (Tr. 1176-77, 1223-25) Curiously, SEIU objected to the introduction, and the Hearing Officer refused to receive the secret affidavits. Instead, the affidavits were placed in the rejected exhibit file, once again keeping them hidden from view.

¹⁰ As emphasized in Duke's post-hearing brief and above, Section 102.68 of the Board's Rules defines the "record" in a representation proceeding, and the Union's pre-hearing affidavits cannot be considered part of that record, particularly after they were excluded by the Hearing Officer. *See* 29 CFR § 102.68. Section 102.67(a) states that "[a] decision by the regional director upon the record shall set forth the director's findings, conclusions, and order or direction." *See* 29 CFR § 102.67(a). Once the Regional Director decided to open a record and solicit the parties' positions concerning the appropriateness of a mail ballot election and voter eligibility formula, among other things, he may only render a decision based on the official "record," i.e., testimony, other evidence, and argument presented at the hearing.

failing to identify any circumstances, much less “unusual circumstances,” sufficient to overcome the presumption in favor of a manual ballot election.

Compounding his errors, the Regional Director ignored the Board’s lead case on this point, *San Diego Gas & Electric*, 325 NLRB 1143 (1998). The Casehandling Manual instructs Regional Directors to consider the three factor test set forth in *San Diego Gas & Electric*. The Manual states that “[t]he Regional Director should use his/her discretion in deciding which type of election to conduct, ***taking into consideration at least the following situations*** that normally suggest the propriety of using mail ballots:

- (a) where eligible voters are “scattered” because of their job duties over a wide geographic area[;]
- (b) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (c) where there is a strike, a lockout or picketing in progress.¹¹

NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2 (September 2014) (emphasis added). The Regional Director did not even make passing reference to *San Diego Gas & Electric* in the DDE, let alone go through the analysis required by that case and the Casehandling Manual. Had he done so here, the Regional Director would have concluded that a mail ballot election would be inappropriate.

Duke demonstrated that all PhD students are based at the Durham campus, with the exception of the approximately 16 students who perform instructional/research services at the Beaufort campus.¹² (Tr. 1101, 1118-19) And, although teaching and research assistants may not

¹¹ The third prong of the *San Diego Gas & Electric* test is inapplicable here. No eligible graduate students are on strike, locked-out or picketing.

¹² Duke agreed to a polling location on the Beaufort campus. (Tr. 1065, 1076)

be required at all times to perform their duties and/or engage in their studies on campus, the record reflects that most do so.

In addition, while the Duke campus may be somewhat larger than urban campuses where the Board recently has conducted graduate student elections, it is not so sprawling as the Union contended. It is easily accessed from all directions and there is abundant parking on campus. For those who do not have their own transportation, a campus bus service is available that provides access to all areas. (Bd. Ex. 5; Er. Ex. 43, 44, 45, 46, 47; Tr. 1071-72, 1101-02, 1227-30) There is also a public bus -- free for Duke students -- that runs from Duke's main campus to downtown Durham, including a stop at the Carmichael Building. (Er. Ex. 44; Tr. 1228) The buses run nearly around-the-clock on all weekdays.¹³ (Er. Ex. 46, 47) It is exceedingly easy to get to the campus and to move around freely once there. Thus, there is no force whatsoever to the Union's argument of geographic scattering.

Nor are Duke's teaching and research assistants scattered in terms of their scheduling. Like many other workforces, they work at different times of the day and on different days of the week. (Tr. 1103) However, their schedules do not "vary significantly," such that there is no time when all could vote. Duke proposed an on-campus election on two days from 7:00 AM to 9:30 PM. (*Id.*; Tr. 1066, 1080) This would allow polls to open one hour before classes begin and close one hour after classes end, more than sufficient time to give all eligible voters the opportunity to vote. (Tr. 1080)

Because none of the three factors identified in *San Diego Gas & Electric* is present here, a mail ballot election cannot be squared with the Board's own policies and procedures. Even if any of them were present, the Casehandling Manual and *San Diego Gas & Electric* teach that

¹³ The parties agreed that any manual ballot election would be held on weekdays. (Tr. 1240-41)

“the Regional Director also should consider [1] the desires of all the parties, [2] the likely ability of voters to read and understand mail ballots and [3] *the availability of addresses for employees.*” NLRB Casehandling Manual (Part Two), Representation Proceedings (September 2014), Section 11301.2 (emphasis added); *San Diego Gas & Electric*, 325 NLRB at 1145.

First, as the Regional Director acknowledged in the DDE, Duke made it abundantly clear that its preference is for a manual ballot. That preference should be accorded significant weight.¹⁴ Indeed, Duke has convincingly demonstrated that a manual ballot is not only presumptively appropriate, it is optimal.

Second, Duke does not know the proper address for many of its students. As emphasized above and in its post-hearing brief, the University maintains records of student addresses, but it has multiple addresses on file for about 81% of all eligible voters and does not require students to designate a “preferred” address.¹⁵ (Er. Ex. 39; Tr. 1110-11) Thus, if a mail ballot election is ordered, Duke would be left to guess which address to use for about 1200 of the nearly 1500 voters. (*Id.*) That the University has addresses on W-2 forms is no answer. The Regional Director instructed the University to use the address on students’ 2016 W-2 form, failing to consider that this may not be the address at which the student currently resides. Notably, the address the student provides for the W-2 form need not be accurate given that, as noted at the hearing, the University typically hand-delivers W-2s to students or places them in students’ departmental mailboxes. The actual handling of these forms reduces the need for students to

¹⁴ The graduate assistant elections at NYU, Columbia and Harvard were all manual ballot elections held during the semester. (Tr. 1122-23) Moreover, in a pending case at Yale University, the Regional Director has directed a manual ballot.

¹⁵ This figure was accurate based on the list of students contained on the list submitted by Duke with its Statement of Position. That list included only those students who were “eligible” as of the Fall 2016 semester. This percentage may be even higher now considering the special voter eligibility formula crafted by the Regional Director, which added over 400 other PhD students.

ensure that their addresses are up to date. Thus, there is no added assurance that the address on a student's W-2 is any more current than any of the student's other addresses on file with the University.¹⁶

Lastly, the Regional Director supported his decision by stating that a manual ballot election "could [] result in numerous challenged ballots." DDE at 32. However, a mail ballot election (especially when coupled with the RD's special, non-fact based eligibility formula) undoubtedly will result in even more challenges. Many ballots are likely to be mailed to the wrong address, leading large numbers of students to request duplicate ballots. That would unnecessarily burden the process and substantially increase the likelihood of confusion, possible shenanigans, and challenges. Voters would have to first recognize that they have not received a ballot; inform the Regional Office of their correct address; request a duplicate ballot; wait to receive the replacement; and finally mark and return the ballot to the Regional Office.

Moreover, the Board's mechanism for sending, receiving, and counting duplicate ballots is prone to error. If a voter requests a duplicate ballot and receives two, only the ballot in the envelope with the earlier postmark may be counted. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11336.4 (September 2014). And, if the voter returns both ballots in the same envelope -- a not uncommon occurrence -- the procedure calls for that ballot to be challenged. *Id.* Voters must also sign the envelope with the proper ballot and "[a]ny ballot received in an envelope that is not signed will be automatically void." DDE at 32. Because of

¹⁶ In general, the proof shows that the University rarely communicates with PhD students by mail. (Er. Ex. 40; Tr. 1107, 1117) John Zhu, Senior Public Affairs Officer and Communications Strategist for the Graduate School, provided an affidavit demonstrating that the Graduate School typically communicates with students via email. (Er. Ex. 40) This includes bills for fees, tuition, or any other goods or services; all are sent by email. (Tr. 1185-86) When mailing documents, the Graduate School requests in advance that the student provide a current mailing address. (*Id.*) For example, any student who wants tickets for their PhD hooding ceremony sent by mail must provide their current mailing address or tickets will not be sent. (*Id.*) This is in recognition of the fact that addresses on file with the University are often inaccurate.

the likelihood that the address on students' W-2 forms often will be incorrect, many students are likely to request duplicate ballots, which will needlessly increase the chance of challenges and objections that could be easily avoided by simply directing an on-campus manual ballot election.

Plainly, the Regional Director erred in determining that a mail ballot election should be conducted on the question concerning representation raised by SEIU's petition, particularly considering the extent to which the Regional Director disregarded NLRB policy, procedure and case law in reaching that conclusion. The Board should stay the mailing of the ballots now scheduled to go out on Friday, February 3, and direct that -- once eligibility is litigated and properly determined -- the election should be conducted by manual ballot on the Duke campus. In all the circumstances, a mail ballot is likely to result in the disenfranchisement of voters to such a degree that the outcome, either way, will not be representative of the sentiments of the eligible voters, or it will have to be re-run. Immediate relief is needed.

CONCLUSION

For all the reasons stated above, the Board should grant review of the DDE with respect to the voter eligibility formula and use of mail ballots, and either reverse the Regional Director or remand the case for the evidentiary hearing that was denied on those two issues. Pending review, the University asks that the Board either stay the election or, in the alternative, cancel the February 21 ballot count and impound the ballots. A stay of the election/impoundment of the ballots is necessary to ensure that the issues raised on review are decided strictly on the merits and without regard to how the ballots have been cast.

Dated: January 30, 2017
New York, New York

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Respectfully Submitted,

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

DUKE UNIVERSITY

-and-

**SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU)**

Case No. 10-RC-187957

Date of Electronic Mailing: January 30, 2017

CERTIFICATION OF SERVICE OF: Duke University's Request for Expedited Review, Stay of Election/Impoundment of Ballots or, in the Alternative, Remand to the Regional Director

I hereby certify that, on the 30th day of January 2017, I caused the above-entitled document to be filed with the National Labor Relations Board on its E-Filing Program. The above-entitled document was also served by the methods indicated below, upon the following persons at the following addresses:

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